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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2026

PAZ R. HERNANDEZ,

Petitioner

v.

THE TRAVELERS INSURANCE COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NOW COMES the Travelers Insurance Company, Respondent, and files this its Brief in Opposition to the Petition for Writ of Certiorari filed by Paz R. Hernandez, Petitioner, and in support of same would show unto the Court as follows:

1. THE DECISION OF THE COURT BELOW IS IN ACCORD WITH THE DECISION OF OTHER COURTS OF APPEAL AS TO THE PROPER MEANING TO BE ASSIGNED 28 U.S.C.A. Sec. 1332(c).

Petitioner admits that all of the reported decisions dealing with the question of whether or not a workmen's compensation case falls within Sec. 1332(c) agree that where an injured workman, who was employed by an employer of his own State, seeks to sue a foreign insurance company who wrote a policy of workmens compensation then no diversity jurisdiction exists. *Vines v. United States Fidelity and Guaranty Company*, 267 F. Supp. 436 (E.D. Tenn. 1967); *Lane v. Insurance Company of*

North America, 268 F. Supp. 345 (E.D. Tenn. 1967). The decision of the Court below, therefore, is in strict accord with all recorded authority on this subject.

Petitioner asserts that the decision in this case conflicts with the decisions in *White v. United States Fidelity and Guaranty Company*, 356 F. 2d 746 (1st Cir. 1966), and *Henderson v. Selective Insurance Company*, 369 F. 2d 143, 149 (6th Cir. 1966).

This appeal turns on whether the use of the word "direct action" in 28 U.S.C.A. Section 1332(c) is restricted to direct actions as authorized in automobile cases in Louisiana and Wisconsin. Neither the decision in *White* nor *Henderson* is supportive of Petitioner's claim. In *White* the Plaintiff was a party seeking to be declared an insured under an insurance policy. The Court in that case correctly deduced that the statute contemplated a situation where an injured third party seeks to recover his damages from the insurance company without first obtaining a judgment or seeking to impose liability upon the insured. The declaratory judgment action did not present such a situation and the court easily held that it was not within the terms of the statute. An analogous case is *Walker v. Fireman's Fund Insurance Company*, 260 F. Supp. 95, 96 (D.C. Montana 1966), wherein the Court "concludes that unless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed would be imposed against the insured, then the action is not a direct action. Here Walker seeks to impose duties upon Fireman's Fund because of the contractual liability assumed by it. This liability could not be asserted against Griel (tort feasor) and hence the action is not a direct action."

The *Henderson* opinion is very similar. There the injured persons first proceeded to judgment against the tort feasor. The Henderson case involved a situation where the judgment creditor of the tort feasor sued Selective Insurance Company to determine that it had insurance coverage under its policy for the tort feasor. This is clearly not a case where the injured party seeks to recover from the insurance company without first obtaining a judgment against the tort feasor. Furthermore, in *Henderson* they were seeking to determine contractual liability which was a different cause of action from that against the tort feasor.

The Court below accepted the definition of a direct action used in *Vines:*

> ". . .Congress intended that where ever a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the others liability insuror (sic) without joining the insured and without having first obtained a judgment against the insured, the insurer shall be deemed a citizen of the State of which the insured is a citizen as well as of any state by which the insurer has been incorporated and of the State where it is has its principal place of business, for the purposes of determining whether diversity jurisdiction exists."

Travelers submits that the decision of the court below is not in conflict with *Henderson* or *White* either in terms of the exact language or the spirit of the law. The courts in *Henderson* and *White* did not say that the only situation to which Sec. 1332(c) would apply would be cases such as in Louisiana and Wisconsin. The holdings of the court in *White* and *Henderson*

are consistent with the definition of direct action used by the court below.

2. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH LEGISLATIVE HISTORY AND THE DECISIONS OF THIS COURT.

Petitioner accuses the Fifth Circuit of deciding this case in a "jurisprudential vacuum" without resort to legislative history. A reading of the opinion makes it clear that the court was very much aware of the legislative history urged upon it by Petitioner. The opinion also makes it clear that the court was giving life to the actual words used by Congress. In so doing the Court below was consistent with the admonition of this court:

> "We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth." *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961).

In this instance Congress spoke of any direct action against the insurer of a policy or contract of liability insurance. The term "liability insurance" is all inclusive. If the Congress had intended to restrict the applicability of this statute to the automobile cases arising out of Wisconsin and Louisiana which are the subject of much of the legislative history, the statute could easily have been worded to refer to "any direct action against the insurer of a policy or contract of automobile liability insurance." This Congress did not do. The obvious meaning of the statute is that it shall apply to any direct action upon any type of liability insurance.

It is now undisputed in this appeal that the court below correctly construed the policy of workmen's compensation insurance to be one within the definition of liability insurance. *Cushing v. Maryland Casualty Company*, 198 F.2d 536, (5th Cir. 1952); *Vines v. United States Fidelity and Guaranty Company, supra.; Lane v. Insurance Company of North America, supra.*

Travelers submits that its interpretation of the amendment to 28 U.S.C.A., Section 1332(c) restricting the jurisdiction of Federal District Courts in workmen's compensation cases is entirely consistent with the policy of Congress in past enactments. Probably the most explicit example of Congressional intent to reduce the involvement of Federal District Courts in workmen's compensation litigation is the amendment to 28 U.S.C.A. Section 1445(c) enacted in 1958 which states:

> "A civil action in any state court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

Thus began the tortured history of Congress' attempt to restrict the involvement of federal district courts in workmen's compensation litigation. One of the first cases construing the amendment to section 1445(c) was *National Surety Corporation v. Chamberlain*, 171 F. Supp. 591 (N.D. Texas, 1959). In this case, an insurance carrier brought suit to set aside the award of the Industrial Accident Board in Federal District Court. The employee had also brought an action to set aside the award in the State District Court. The Federal District Court held that it was without jurisdiction and engaged in a fairly complete synopsis of the congressional intent to restrict jurisdiction of

workmen's compensation cases. Judge Estes referred to S. Rep. No. 1830, 85th Cong., 2d. Sess. 3105 (1958) stating that the Judicial Conference of the United States recommended passage of the bill "to decrease the workload of Federal courts" which has "greatly increased because of the removal of workmen's compensation cases from the state courts to the district courts." Citing the same report the court said "Workmen's compensation cases arise and exist only by the virtue of state law. No federal question is involved and no law of the United States is involved in these cases." Judge Estes went on to say that "It is certain that Congress did not intend the Federal Court to have jurisdiction in a case such as this."

However, in an identical and later case, the Fifth Circuit Court of Appeals ruled in effect that Judge Estes had overstepped his bounds by not staying with the language of the statute and by trying to read into the statute another element. In a strongly worded opinion in *Liberty Mutual Insurance v. Horton*, 275 F2d 148 (5th Cir. 1960), the court reacted to the above quoted statements from Judge Estes and said that it:

> "Flies in the face of the act itself, limiting its reach to removal cases, and is, therefore, mere fiating. In short, Congress has withdrawn removal cases concerning workmen's compensation laws from federal jurisdiction. Congress was aware that certain workmen's compensation suits are filed in federal courts, under state laws, as original actions. If the intent of Congress had been to withdraw these cases also from federal jurisdiction, it could have said so by the simple insertion of the words 'or filed in the United States District Courts.' It is highly improper to extend such exclusion without Congressional act."

This case found its way to the Supreme Court of the United States in *Horton v. Liberty Mutual Insurance Co., supra.* In a five to four opinion, the decision of the Fifth Circuit was affirmed. The court first reviewed the Congressional history and the intent of the Congress to restrict workmen's compensation cases in the federal district courts. Referring to this history as "appealing considerations" the Court nevertheless ruled that the district court had overstepped its bounds by expanding the force of the statute to cases not involving removal.

Travelers submits that Congress did exactly what this court suggested and has effectively foreclosed workmen's compensation suits where there is no diversity of citizenship between the employer and his employee. This distinction is clearly grounded by a Congressional policy that in suits involving liability matters where the injured party and the insured are of the same state, there is little or no reason for the federal district courts to undertake diversity jurisdiction. However, the Congress carefully preserved diversity jurisdiction in situations where the employee and employer are citizens of different states. Apparently the Congress believed that in this situation there was a sufficient reason for preserving diversity jurisdiction.

If it was improper for Judge Estes in the *National Surety* case to extend the application of the removal statute, then it would be just as improper for this court to add language to the statute restricting it to automobile liability cases as in Louisiana and Wisconsin. The statute is broad and applies to all direct actions on all liability insurance policies. The facts in this case fit the statute like a glove.

3. THE JURISDICTIONAL STATUTE DOES NOT OFFEND DUE PROCESS.

Petitioner alleges that 28 U.S.C.A. Section 1332(c) violates due process because the federal courts are open to the insurance company but not the workman. None of the opinions or authority cited by Petitioner relate to jurisdictional matters or are authority in support of his proposition. Furthermore, Respondent submits that Petitioner's position is foreclosed by the language this court used in *Horton:*

> "Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still." (367 U.S. 348, 352).

Furthermore, the decision relied upon by Petitioner, *Atlantic Mutual Insurance Company v. Mitchell,* 333 F. Supp. 70 (N.D. Tex. 1971), is not well reasoned in that it deliberately ignores the realities of a workmen's compensation action. These realities were specifically relied upon by this court in *Horton,* which involved a question of jurisdictional amount. The Court took notice of the Texas practice that when an insurance company appeals an award of the Industrial Accident Board, the mere act of filing an appeal in a court of competent jurisdiction divests the Industrial Accident Board of jurisdiction and sets aside the award of the Industrial Accident Board. Trial is de novo on the workman's compulsory counterclaim and without reference to the decision of the Industrial Accident Board. *Commercial Standard Insurance Co. v. Cotton,* 443 S.W.2d 423 (Tex.Civ.App. – Eastland, writ ref'd, 1969); *Booth v. Texas Employers' Insurance Association,* 132 Tex. 237, 123 S.W.2d

322 (Com., opinion adopted by Sup. Ct. 1939). Both of these cases have Texas Supreme Court authority.

In *Horton* the insurance company filed an appeal and it was then encumbent upon the workman to counterclaim for his damages. The court noted that the counterclaim was in excess of the jurisdictional amount and, cognizant of the realities of the situation, ruled that that was sufficient to invoke the jurisdiction of the court. Similarly, in the situation where an appeal is filed by the insurance company, the real matter in controversy is the suit by the injured workman. Such a claim is a "direct action" within the terms of 28 U.S.C.A. Sec. 1332(c). There shouldn't be any difference in the jurisdiction of the Federal Courts, no matter which party appeals.

Respondent notes that this case which Petitioner relies on is a unique and isolated decision resting on no legal authority. *Mitchell* was a memorandum decision and has not been cited or relied upon by any other court. Nor has any court of appeals ruled in accord with *Mitchell* since the enactment of the amendment to 28 U.S.C.A. Sec. 1332(c). Furthermore, the reasoning of this case which Petitioner asserts as authority is only the reasoning of one judge since no cases from Texas or any other state were cited as a basis for this opinion.

In summary, the authorities cited by Petitioner do not support his proposition and the alleged constitutional argument is strictly boot strap and insubstantial.

4. PROSPECTIVE OVERRULING WOULD BE IMPROPER

In a single paragraph, Petitioner urges this court to rule

prospectively on this jurisdictional matter. The cases cited by Petitioner do not support this proposition. It is the duty of the court to enforce the Congressional act. There either is or is not jurisdiction. Petitioner alleges that he has relied on the language of the statute. If so, such reliance was misplaced and certainly against all the existing authority at the time this suit was filed.

5. CONCLUSION

Respondent submits that the Petition for Writ of Certiorari should be denied because the decision of the Court below is correct and the Petition for Writ of Certiorari does not raise any substantial questions to be decided by this court.

Respectfully Submitted,

WILEY, PLUNKETT, GIBSON & ALLEN

BY: _____
JERRY A. GIBSON

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have this 14 day of August, 1974, been mailed to Mr. Les Mendelsohn, 702 San Antonio Savings Building, San Antonio, Texas 78205.

BY: _____
JERRY A. GIBSON
ATTORNEY FOR RESPONDENT